

CHAPTER 446

CRIMINAL LAW AND PROCEDURE

HOUSE BILL 21-1069

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also SENATOR(S) Fields and Gardner, Bridges, Buckner, Cooke, Coram, Danielson, Fenberg, Ginal, Hisey, Holbert, Kirkmeyer, Kolker, Lee, Lundeen, Pettersen, Priola, Rankin, Scott, Simpson, Smallwood, Story, Winter, Woodward, Zenzinger, Garcia.

AN ACT

CONCERNING ENHANCING THE ENFORCEMENT OF CRIMES OF SEXUAL EXPLOITATION OF A CHILD, AND, IN CONNECTION THEREWITH, REQUIRING A POST-ENACTMENT REVIEW OF THE IMPLEMENTATION OF THIS ACT AND MAKING AN APPROPRIATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. (1) The general assembly finds that for the purpose of performing a post-enactment review of the implementation of HB 21-1069, it is necessary to review the following statewide data for the three years prior and subsequent to the passage of HB 21-1069 in order to assess its impact on sentencing and the filing of counts based on the number of images in violation of section 18-6-403 (3)(b.5):

(a) The number of cases filed that include a violation of section 18-6-403 (3)(b.5) and the number of counts in each case for violation of 18-6-403 (3)(b.5);

(b) The number of convictions for violation of section 18-6-403 (3)(b.5) resulting in a sentence to the department of corrections and the lengths of those sentences; and

(c) The number of convictions for violation of section 18-6-403 (3)(b.5) resulting in a sentence to probation or a community-based sentence.

SECTION 2. In Colorado Revised Statutes, 18-6-403, **amend** (2)(e), (2)(j), (3)(b), (3)(b.5), (3)(d), and (5)(b); and **add** (2)(i.5), (5.5), and (5.7) as follows:

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

18-6-403. Sexual exploitation of a child - legislative declaration - definitions.

(2) As used in this section, unless the context otherwise requires:

(e) "Explicit sexual conduct" means sexual intercourse, SEXUAL INTRUSION, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement.

(i.5) "SEXUAL INTRUSION" MEANS AN INTRUSION, HOWEVER SLIGHT, BY AN OBJECT OR A PART OF A PERSON'S BODY, EXCEPT THE MOUTH, TONGUE, OR PENIS, INTO THE GENITAL OR ANAL OPENING OF ANOTHER PERSON'S BODY IF THAT SEXUAL INTRUSION CAN REASONABLY BE CONSTRUED AS BEING FOR THE PURPOSE OF SEXUAL AROUSAL, GRATIFICATION, OR ABUSE.

(j) "Sexually exploitative material" means any photograph, motion picture, video, recording or broadcast of moving visual images, LIVESTREAM, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct.

(3) A person commits sexual exploitation of a child if, for any purpose, he or she knowingly:

(b) Prepares, arranges for, publishes, ~~including but not limited to publishing through digital or electronic means~~, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, or distributes, TRANSPORTS OR TRANSFERS TO ANOTHER PERSON, OR MAKES ACCESSIBLE TO ANOTHER PERSON, including, but not limited to, ~~distributing through digital or electronic means~~, any sexually exploitative material; or

(b.5) ACCESSES WITH INTENT TO VIEW, VIEWS, possesses, or controls any sexually exploitative material for any purpose; except that this subsection (3)(b.5) does not apply to law enforcement personnel, defense counsel personnel, or court personnel in the performance of their official duties, nor does it apply to physicians, psychologists, therapists, or social workers, so long as such persons are licensed in the state of Colorado and the persons possess such materials in the course of a bona fide treatment or evaluation program at the treatment or evaluation site; or

(d) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing a performance, OR ACCESSES WITH INTENT TO VIEW OR VIEWS EXPLICIT SEXUAL CONDUCT IN THE FORM OF A PERFORMANCE INVOLVING A CHILD IF THE CONDUCT IN THE PERFORMANCE WAS CAUSED, INDUCED, ENTICED, REQUESTED, DIRECTED, OR SPECIFIED BY THE VIEWER OR POTENTIAL VIEWER.

(5) (b) Sexual exploitation of a child ~~by possession of sexually exploitative material pursuant to paragraph (b.5) of subsection (3)~~ SUBSECTION (3)(b.5) of this section is a class 5 felony FOR EACH ITEM OF SEXUALLY EXPLOITATIVE MATERIAL ACCESSED WITH INTENT TO VIEW, VIEWED, POSSESSED, OR CONTROLLED; except that said offense is a class 4 felony if:

(I) It is a second or subsequent offense; or

(II) ~~The possession of an item accessed with intent to view, viewed, possessed, or controlled is of a video, recording or broadcast of moving visual images, or motion picture. or more than twenty different items qualifying as sexually exploitative material.~~

(5.5) SEXUAL EXPLOITATION OF A CHILD IS AN EXTRAORDINARY RISK CRIME THAT IS SUBJECT TO THE MODIFIED PRESUMPTIVE SENTENCING RANGE SPECIFIED IN SECTION 18-1.3-401 (10) IF THE SEXUALLY EXPLOITATIVE MATERIAL DEPICTS A CHILD WHO IS:

- (a) UNDER TWELVE YEARS OF AGE;
- (b) SUBJECTED TO THE ACTUAL APPLICATION OF PHYSICAL FORCE OR VIOLENCE;
OR
- (c) SUBJECT TO SEXUAL INTERCOURSE, SEXUAL INTRUSION, OR SADOMASOCHISM.

(5.7) NOTWITHSTANDING SECTION 16-22-113 (3)(c) TO THE CONTRARY, AN ADULT WHO HAS MORE THAN ONE CONVICTION OF 18-6-403 (3)(b.5) IN A SINGLE CRIMINAL CASE IS ELIGIBLE TO PETITION FOR REMOVAL FROM THE REGISTRY PURSUANT TO SECTION 16-22-113.

SECTION 3. In Colorado Revised Statutes, 16-22-113, **amend** (3)(c) as follows:

16-22-113. Petition for removal from registry. (3) The following persons are not eligible for relief pursuant to this section, but shall be subject for the remainder of their natural lives to the registration requirements specified in this article 22 or to the comparable requirements of any other jurisdictions in which they may reside:

- (c) Any adult who has more than one conviction or adjudication for unlawful sexual behavior in this state or any other jurisdiction, EXCEPT AS PROVIDED IN SECTION 18-6-403 (5.7).

SECTION 4. In Colorado Revised Statutes, 18-1.3-401, **amend** (10)(a), (10)(b) introductory portion, (10)(b)(XVII), and (10)(b)(XVIII); and **add** (10)(b)(XIX) as follows:

18-1.3-401. Felonies classified - presumptive penalties. (10) (a) The general assembly hereby finds that certain crimes ~~which~~ THAT are listed in ~~paragraph (b) of this subsection (10)~~ SUBSECTION (10)(b) OF THIS SECTION present an extraordinary risk of harm to society and therefore, in the interest of public safety, for such crimes ~~which~~ THAT constitute class 3 felonies, the maximum sentence in the presumptive range ~~shall be~~ is increased by four years; for such crimes ~~which~~ THAT constitute class 4 felonies, the maximum sentence in the presumptive range ~~shall be~~ is increased by two years; for such crimes ~~which~~ THAT constitute class 5 felonies, the maximum sentence in the presumptive range ~~shall be~~ is increased by one year; for such crimes ~~which~~ THAT constitute class 6 felonies, the maximum sentence in the presumptive range ~~shall be~~ is increased by six months.

- (b) Crimes that present an extraordinary risk of harm to society ~~shall~~ include the following:

(XVII) A class 3 felony offense of human trafficking for sexual servitude, as described in section 18-3-504; ~~and~~

(XVIII) Assault in the second degree, as described in section 18-3-203 (1)(i);
AND

(XIX) SEXUAL EXPLOITATION OF A CHILD, AS DESCRIBED IN SECTION 18-6-403 (5.5).

SECTION 5. In Colorado Revised Statutes, 18-21-103, **amend** (4); and **add** (3.3), (3.5), and (3.7) as follows:

18-21-103. Source of revenues - allocation of money - sex offender surcharge fund - sexual exploitation of children surcharge fund - creation. (3.3) (a) ON AND AFTER JANUARY 1, 2022, EACH PERSON WHO IS CONVICTED OF OR RECEIVES A DEFERRED SENTENCE PURSUANT TO SECTION 18-1.3-102 FOR SEXUAL EXPLOITATION OF A CHILD, AS DESCRIBED IN SECTION 18-6-403, IS REQUIRED TO PAY A SEXUAL EXPLOITATION OF CHILDREN SURCHARGE IN ADDITION TO THE SEX OFFENDER SURCHARGE REQUIRED PURSUANT TO SUBSECTION (1) OF THIS SECTION TO THE CLERK OF THE COURT WHERE THE CONVICTION OCCURS OR THE DEFERRED SENTENCE IS ENTERED. THE AMOUNT OF THE ADDITIONAL SURCHARGE IS, BASED ON THE HIGHEST PENALTY LEVEL AMONG THE CRIMES OF CONVICTION OR DEFERRED SENTENCE IN THE CASE:

(I) FOR A CLASS 3 FELONY OF WHICH A PERSON IS CONVICTED, TWO THOUSAND DOLLARS;

(II) FOR A CLASS 4 FELONY OF WHICH A PERSON IS CONVICTED, ONE THOUSAND DOLLARS;

(III) FOR A CLASS 5 FELONY OF WHICH A PERSON IS CONVICTED, FIVE HUNDRED DOLLARS; AND

(IV) FOR A CLASS 6 FELONY OF WHICH A PERSON IS CONVICTED, TWO HUNDRED AND FIFTY DOLLARS.

(b) A JUVENILE WHO IS CONVICTED OR RECEIVES A DEFERRED SENTENCE PURSUANT TO SECTION 18-1.3-102 FOR SEXUAL EXPLOITATION OF A CHILD, AS DESCRIBED IN SECTION 18-6-403, IS NOT REQUIRED TO PAY AN ADDITIONAL SURCHARGE PURSUANT TO SUBSECTION (3.3)(a) OF THIS SECTION.

(3.5) THE CLERK OF THE COURT SHALL ALLOCATE THE SURCHARGE REQUIRED BY SUBSECTION (3.3) OF THIS SECTION AS FOLLOWS:

(a) THE CLERK OF THE COURT SHALL RETAIN FIVE PERCENT FOR ADMINISTRATIVE COSTS INCURRED PURSUANT TO THIS SUBSECTION (3.5). THE CLERK OF THE COURT SHALL TRANSMIT THE AMOUNT RETAINED PURSUANT TO THIS SUBSECTION (3.5)(a) TO THE STATE TREASURER, WHO SHALL CREDIT THE AMOUNT TO THE GENERAL FUND. THE AMOUNT IS SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY FOR THE COSTS OF SUCH ADMINISTRATION.

(b) THE CLERK OF THE COURT SHALL TRANSMIT NINETY-FIVE PERCENT TO THE STATE TREASURER, WHO SHALL CREDIT THE AMOUNT TO THE SEXUAL EXPLOITATION OF CHILDREN SURCHARGE FUND CREATED IN SUBSECTION (3.7) OF THIS SECTION.

(3.7) (a) THERE IS HEREBY CREATED IN THE STATE TREASURY THE SEXUAL EXPLOITATION OF CHILDREN SURCHARGE FUND, REFERRED TO IN THIS SUBSECTION (3.7) AS THE "FUND", THAT CONSISTS OF MONEY RECEIVED BY THE STATE TREASURER PURSUANT TO SUBSECTION (3.5) OF THIS SECTION. THE MONEY IN THE FUND IS CONTINUOUSLY APPROPRIATED TO THE COLORADO BUREAU OF INVESTIGATION IN THE DEPARTMENT OF PUBLIC SAFETY TO ENHANCE THE EFFECTIVE INVESTIGATION AND PROSECUTION OF COMPUTER-FACILITATED SEXUAL EXPLOITATION OF CHILDREN PURSUANT TO SECTION 24-33.5-430.

(b) THE STATE TREASURER MAY INVEST ANY MONEY IN THE FUND NOT EXPENDED FOR THE PURPOSE OF THIS SECTION AS PROVIDED BY LAW. THE STATE TREASURER SHALL CREDIT ALL INTEREST AND INCOME DERIVED FROM THE INVESTMENT OF MONEY IN THE FUND TO THE FUND. ANY MONEY NOT APPROPRIATED BY THE GENERAL ASSEMBLY AND ALL UNEXPENDED AND UNENCUMBERED MONEY AT THE END OF THE FISCAL YEAR REMAINS IN THE FUND AND MUST NOT BE TRANSFERRED OR REVERT TO THE GENERAL FUND AT THE END OF ANY FISCAL YEAR.

(4) The court may waive all or any portion of ~~the~~ a surcharge required by this section if the court finds that a person ~~convicted of a sex offense~~ is indigent or financially unable to pay all or any portion of such surcharge. The court shall waive only that portion of ~~the~~ a surcharge ~~which~~ if the court has found that the person ~~convicted of a sex offense~~ is financially unable to pay.

SECTION 6. In Colorado Revised Statutes, **add** 24-33.5-430 as follows:

24-33.5-430. Enhance effective investigation and prosecution of computer-facilitated sexual exploitation of children - rules. (1) THE BUREAU SHALL DEVELOP AND ACQUIRE, AND MAY ASSIST OTHER LAW ENFORCEMENT AGENCIES WITH DEVELOPING AND ACQUIRING, NECESSARY TECHNOLOGICAL OR EXPERT RESOURCES TO INVESTIGATE AND PROSECUTE COMPUTER-FACILITATED CRIMES OF SEXUAL EXPLOITATION OF A CHILD AS DESCRIBED IN SECTION 18-6-403.

(2) THE COSTS OF PERFORMING THE FUNCTIONS OF THIS SECTION ARE FUNDED PURSUANT TO THE SEXUAL EXPLOITATION OF CHILDREN SURCHARGE FUND CREATED IN SECTION 18-21-103 (3.7).

(3) THE BUREAU MAY APPLY FOR GIFTS, GRANTS, OR DONATIONS FROM THE FEDERAL GOVERNMENT AND ANY PUBLIC OR PRIVATE SOURCE. THE BUREAU SHALL TRANSMIT ANY MONEY RECEIVED TO THE STATE TREASURER FOR DEPOSIT IN THE SEXUAL EXPLOITATION OF CHILDREN SURCHARGE FUND CREATED IN SECTION 18-21-103 (3.7). THE BUREAU SHALL PERFORM THE FUNCTIONS OF THIS SECTION FROM GENERAL FUND MONEY APPROPRIATED TO THE BUREAU BY THE GENERAL ASSEMBLY FOR THE PERFORMANCE OF THE FUNCTIONS OF THIS SECTION AND MONEY APPROPRIATED FROM THE SEXUAL EXPLOITATION OF CHILDREN SURCHARGE FUND.

(4) THE BUREAU MAY PROMULGATE RULES AS NECESSARY TO PERFORM THE FUNCTIONS OF THIS SECTION.

SECTION 7. Accountability. Notwithstanding the requirement to conduct a review of the implementation of this act either two or five years after the enactment of the act, three years after this act becomes law and in accordance with section 2-2-1201, Colorado Revised Statutes, the legislative service agencies of the Colorado general assembly shall conduct a post-enactment review of the implementation of this act utilizing the information contained in the legislative declaration set forth in section 1 of this act.

SECTION 8. Appropriation. For the 2021-22 state fiscal year, \$1,894 is appropriated to the judicial department. This appropriation is from the general fund. To implement this act, the department may use this appropriation for trial court programs.

SECTION 9. Act subject to petition - effective date - applicability. (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2022 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to offenses committed on or after the applicable effective date of this act.

Approved: July 6, 2021